Indah Water Konsortium Sdn Bhd v Inti Johan Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO 22NCVC-230–02 OF 2012
VAZEER ALAM MYDIN JC
31 MAY 2013

Local Government — Sewerage work — Charges — Sewerage back charges — Lump sum bill of 10 years — Whether conduct reasonable — Whether defendant owner/occupier of premises — Liability to pay sewerage charges — Whether owner and/or occupier and/or user of premises had any obligation to pay sewerage charges — Whether charges must be apportioned to all other owners and/or occupiers and/or users in complex

The plaintiff was authorised to demand, collect and retain sewerage charges as stipulated under the Sewerage Services (Charges) Regulations 1994 ('the Regulations') pursuant to ss 84 and 86 of the Water Services Industry Act 2006 ('the Act') read together with s 185 (2) of the same Act. The defendant was the owner and/or occupier of the premises in question ('the premises'). In the present claim, the plaintiff sought for back charges which had been charged by the plaintiff pursuant to reg 4(1)(b) of the Second Schedule to the Regulations. In denying the plaintiff's allegations, the defendant submitted that it was not the owner or occupier of the premises for the duration of the period for which the charges have been raised; the plaintiff's claim was for the whole commercial complex; the owner of the premises was one Maxisegar Construction Sdn Bhd ('Maxisegar') and the plaintiff had in the past sent sewerage bills to Maxisegar for the premises and the defendant was not liable for the same. The issues that arose for the court's determination were whether the defendant was the owner and/or occupier and/or user of the premises; whether the defendant as owner and/or occupier and/or user of the premises had any obligation to the defendant to pay the sewerage charges; and whether the defendant had sole liability to pay the sewerage charges claimed by the plaintiff or was there a need to apportion the charges to all other owners and/or occupiers and/or users in the complex.

Held, dismissing the claim with costs of RM20,000:

(1) The court could not find that an obligation on the part of the defendant to pay the plaintiff. The plaintiff should not wait for ten years and then lump together some figures and send them off to the defendant as the defendant's bill for the last ten years. That was unreasonable conduct. In as much as the statute and regulation imposed a statutory duty on users to pay their monthly sewerage services bills, the statute and regulation

also imposed reciprocal duties and obligations to ensure that bills were calculated in accordance to the method and formula provided in the regulations and not arbitrarily. The regulations also require that the plaintiff raise the bills in a timely manner. The sum of RM770,045.43 was no small amount and could have the dire effect on a commercial enterprise and in particular, the defendant's cash flow (see para 15).

(2) The plaintiff had committed an error in making that calculation, in particular the second tier charge based on volume of water consumed on the premises. There was only one bulk water meter for the whole building complex. That bulk meter supplied water to the entire building complex. From this bulk water meter, water was supplied to all owners and/or occupiers in the building complex. The defendant only occupied two floors among the many blocks and floors in the building complex. In computing the monthly charges, the plaintiff could not take the bulk meter reading as the measure of monthly water consumption by the defendant. That bulk water consumption must be apportioned to all other users in the building complex to derive at the defendant's consumption. This, the plaintiff failed to do (see para 11).

(3) The building complex had a joint management body ('JMB') formed to take charge of the common areas and facilities. The bulk water meter was under the purview of the JMB and the individual unit's consumption would be apportioned by the JMB and that was a more equitable and reasonable measure of consumption. It was definitely wrong to bill the defendant for the bulk water consumption of the whole building. In any event such a method of calculation ran afoul of the provisions of reg 4(1)(b)(ii). Therefore, the charges sought to be imposed on the defendant based on the bulk water meter reading and attributing the consumption wholly to the defendant was wrong in law (see para 12).

[Bahasa Malaysia summary

Plaintif telah diberi kuasa untuk menuntut, memungut dan menyimpan caj pembentungan seperti yang ditetapkan di bawah Peraturan-Peraturan Perkhidmatan Pembetungan (Caj) 1994 ('Peraturan') menurut ss 84 dan 86 Akta Industri Perkhidmatan Air 2006 ('Akta') dibaca bersama dengan s 185 (2) Akta yang sama. Defendan adalah pemilik dan/atau penghuni premis yang berkenaan ('premis'). Dalam tuntutan ini, plaintif yang meminta untuk bayaran balik caj yang telah dikenakan oleh plaintif menurut peraturan 4(1)(b) Jadual Kedua kepada Peraturan-Peraturan. Dalam menafikan dakwaan plaintif, defendan berhujah bahawa ia bukan pemilik atau penghuni premis itu bagi tempoh jangka masa yang mana caj telah dikenakan; tuntutan plaintif adalah untuk keseluruhan kompleks perniagaan; pemilik premis adalah satu Maxisegar Sdn Bhd ('Maxisegar') dan plaintif telah pada masa lalu menghantar bil pembetungan kepada Maxisegar untuk premis tersebut dan defendan tidak bertanggungan atas perkara yang sama. Isu-isu yang timbul untuk penentuan

mahkamah adalah sama ada defendan adalah pemilik dan/atau penghuni dan/atau pengguna premis tersebut; sama ada defendan sebagai pemilik dan/atau penghuni dan/atau pengguna premis mempunyai apa-apa kewajipan ke atas defendan untuk membayar caj pembetungan; dan sama ada defendan mempunyai liabiliti mutlak untuk membayar caj yang dituntut oleh plaintif atau terdapat keperluan untuk mengumpukkan caj kepada semua pemilik dan/atau penghuni dan/atau pengguna di kompleks tersebut.

Diputuskan, menolak tuntutan dengan kos sebanyak RM20,000:

(1) Mahkamah tidak mendapati bahawa terdapat kewajipan di pihak defendan untuk membayar plaintif. Plaintif tidak patut menunggu selama sepuluh tahun dan kemudian sekali gus bersama-sama beberapa jumlah dan menuntut kepada defendan sebagai bil defendan untuk sepuluh tahun yang lalu. Itu adalah kelakuan yang tidak munasabah. Sebanyak mana di dalam statut dan peraturan yang mengenakan kewajipan berkanun ke atas pengguna untuk membayar bil-bil perkhidmatan pembetungan bulanan mereka, statut dan peraturan juga menggenakan kewajipan dan obligasi timbal balik untuk memastikan bahawa bil-bil dikira mengikut kaedah dan formula yang diperuntukkan dalam peraturan-peraturan dan tidak sewenang-wenangnya. Peraturan-peraturan yang juga memerlukan plaintif memungut bil tepat pada masanya. Jumlah RM770,045,43 bukanlah jumlah kecil dan boleh mempunyai kesan yang buruk pada perusahaan komersial dan khususnya, aliran tunai defendan (lihat perenggan 15).

(2) Plaintif telah melakukan kesilapan dalam membuat pengiraan, khususnya caj peringkat kedua berdasarkan jumlah air yang digunakan di premis tersebut. Terdapat hanya satu meter air pukal bagi kompleks bangunan keseluruhan. Bahawa meter pukal membekalkan air bagi keseluruhan kompleks bangunan tersebut. Dari meter air pukal ini, air dibekalkan kepada semua pemilik dan/atau penghuni di kompleks bangunan. Defendan hanya menduduki dua tingkat di antara blok-blok dan tingkat-tingkat yang banyak di kompleks bangunan tersebut. Dalam mengira caj bulanan, plaintif tidak boleh mengambil bacaan meter pukal sebagai penilaian penggunaan air bulanan oleh defendan. Bahawa penggunaan air pukal perlu diagihkan kepada semua pengguna-pengguna lain kompleks bangunan untuk mendapatkan penggunaan defendan. Plaintif gagal berbuat demikian (lihat perenggan 11).

(3) Kompleks bangunan mempunyai badan pengurusan bersama ('BPB') yang ditubuhkan untuk menjaga kawasan umum dan kemudahan. Meter air pukal adalah di bawah bidang kuasa BPB dan penggunaan unit individu akan diagihkan oleh BPB dan itu adalah langkah penggunaan yang lebih saksama dan munasabah. Ia adalah salah untuk menghantar

bil kepada defendan untuk penggunaan air sebahagian besar daripada seluruh bangunan. Walau bagaimanapunpun kaedah pengiraan sedemikian bercanggah dengan peruntukan peraturan 4(1)(b)(ii). Oleh itu, caj yang dikenakan ke atas defendan berdasarkan pembacaan meter air pukal dan menggaitkan penggunaan sepenuhnya kepada defendan adalah salah di sisi undang-undang (lihat perenggan 12).]

Legislation referred to

Water Services Industry Act 2006 ss 84, 86, 185(2)
Sewerage Services (Charges) Regulations 1994 regs 2, 4(1)(b), (1)(b)(ii), 7, 11, Second Schedule

Sharen bin Rosli (Muhammad Faizal Izzati with him) (Arifin & Partners) for the plaintiff.
Ricky Tan (Mohammed Azwan bin Md Arif with him) (Ricky Tan & Co) for the defendant.

Vazeer Alam Mydin JC:

[1] The plaintiff's claim is for arrears in sewerage services charges amounting to RM770,045.43 from 1 July 2002 to 31 January 2009 together with interest and cost.

[2] The facts of the plaintiff's claim are as follows:

(a) Pursuant to ss 84 and 86 of the Water Services Industry Act 2006 ('the Act') read together with s 185(2) of the Act, the plaintiff is authorised to demand, collect and retain sewerage charges as stipulated under the Sewerage Services (Charges) Regulations 1994 ('the Regulations').

(b) The defendant is the owner and/or occupier of premises known as Kompleks Beli Belah Pandan Kapital, Jalan Pandan Utama, Pandan Indah, 55100 Kuala Lumpur ('the premises').

(c) The sewerage charges payable by the defendant to the plaintiff are for connected services to the premises under account No 47913108. The plaintiff's claim is in fact for back charges which had been charged by the plaintiff pursuant to reg 4(1)(b) of the Second Schedule to the Regulations. The particulars of the charges are as provided in the statement of account dated 26 August 2011 marked as appendix TV and attached together with the statement of claim.

(d) The connected services provided by the plaintiff to the defendant includes the receiving, collecting, conveying, gathering, storing, transporting, treating and disposing of sewage and sewage sludge from private connection pipes from the premises entering the sewerage systems of the plaintiff.

(e) The defendant has failed to pay the aforesaid charges despite demands for payment including a demand through the plaintiff's solicitors. A

(f) Thus the filing of this claim.

[3] The defendant denies the plaintiff's claim and states: B

(a) That it is not the owner or occupier of the premises for the duration of the period for which the charges have been raised and puts the plaintiff to strict proof thereof.

(b) The plaintiff's claim is for the whole commercial complex comprising the Kompleks Beli-Belah Pandan Kapital, MPAJ Square (Menara A, B, C & D), Kompleks Pandan Kapital, podium and car parks. C

(c) The owner of the premises is Maxisegar Construction Sdn Bhd and the plaintiff has in past sent sewerage bills to Maxisegar Construction Sdn Bhd for the premises and the defendant is not liable for the same. D

(d) There are different owners and occupiers for different blocks or floors in the entire building complex and that the defendant only occupies two floors of the complex.

(e) The defendant has never been served with any sewerage bills for payment in the past or at all. E

[4] At trial the plaintiff called two witnesses that is Muhammad Adib bin Mohd Ali ('PW1'), the plaintiff's Channel Executive ('Eksekutif Rangkaian') and Devi a/p Apalandu ('PW2'), the plaintiff's data manager. The defendant called its senior manager Ong Jit Kiat ('DW1') as its sole witness. F

[5] The issues to be tried as agreed upon by the parties are:

(a) whether the defendant was the owner and/or occupier and/or user of the premises; G

(b) whether the defendant as owner and/or occupier and/or user of the premises had any obligation to the defendant to pay the sewerage charges; and

(c) whether the defendant had sole liability to pay the sewerage charges claimed by the plaintiff or is there a need to apportion the charges to all other owners and/or occupiers and/or users in the complex. H

[6] In trying to answer these questions a good starting point would be to look at the relevant provisions in the Regulations, in particular reg 11 provides that: I

> The owner and occupier of a premise to which sewerage services has been provided by a sewerage services contractor under these Regulations shall be jointly and severally liable to pay the sewerage charges, provided the owner of the premise shall,

> in the absence of any agreement to the contrary, be entitled to recover from the occupier of the said premise any such charges paid by him at the time of occupation by the occupier.

Therefore, under reg 11, the liability to pay the sewerage services charges would be on the owner and occupier jointly and severally. As such in order for liability to arise the plaintiff would have to prove that the defendant is either the owner or occupier of the premises. The next regulations to look at would be reg 7 which provides that:

> Any user to whom connected services or septic tank services have been provided shall within fourteen days of the date of the bill pay monthly sewerage charges shown in the bill.

A careful reading of reg 7 shows that the user to whom connected services has been provided will have to pay within 14 days of the date of the bill. This means that the liability for the user to pay arises only after the bill has been rendered. That is so for obvious reasons, for without a bill the user would be at a loss to pay.

It is worth noting that and the term 'user' is defined in reg 2, to mean:

> ... the owner or occupier of a government premise, or any person, firm, body corporate or other legal entity who is the owner or occupier of any domestic, commercial or industrial premises, as the case may be, provided with connected services or septic tank services.

Here, the Premises is said to be commercial and the term 'commercial premises' is defined in reg 2 as:

> ... any premises used wholly or partly for trade, business, provision of services or facilities or any other activity, whether for profit or otherwise.

And 'connected services' is defined in reg 2 as:

> ... the receiving, collecting, conveying, gathering, storing, transporting, treating and disposing of sewage and sewage sludge from private connection pipes entering the sewerage systems.

[7] Taking all these provisions and definitions together, in order for the plaintiff to make a claim for sewerage charges or raise a bill thereof, the plaintiff will have to prove the following:

(a) that the defendant is a user to whom connected services has been provided to the premises;

(b) that the premises is commercial premises in order for commercial rates to apply; and

(c) that the defendant has been provided with monthly bills, which the defendant has not paid within 14 days of the date of the date of the bills.

[8] There is ample evidence showing that the defendant is owner of two floors in the building complex and on these two floors the defendant has a shopping centre known as Pusat Beli Belah Pandan Kapital. In fact there is admission of that fact by DW1. Therefore, what remains to be proved by the plaintiff is that the defendant is a user within the meaning of the Regulations and that bills have been rendered to the defendant before, and that the defendant has failed to pay them within 14 days thereof. If these facts are proved then the defendant would be liable to pay the charges contained in the bills. I will consider these issues shortly.

[9] The plaintiff's case is that, since the premises is commercial premises, the sewerage charges have been calculated in accordance to the provisions of reg 4(1)(b)(ii) of the Second Schedule to the Regulations which reads:

> (1) The monthly sewerage charges payable —
>
> (a) …
>
> (b) by a user in respect of a commercial premise receiving —
>
> (i) …
>
> (ii) connected services and whose commercial premise falls within the categories of annual value specified in the Second Schedule or the categories of improved value in the Third Schedule, whichever, shall be as specified in the respective Schedules;
>
> Provided that in the event the amount of water consumed by any user of a commercial premise exceeds one hundred cubic metres in one month, then an additional charge shall be payable at the rate of sixty-five sen for every cubic metre of water that exceeds one hundred cubic metres as specified in the Schedules.

[10] Therefore, this regulation stipulates that the monthly sewerage charge for a commercial premises has two components:

(a) the first in the basic charge which is based on the annual value of the premises as per reg 4(1)(b)(ii). The defendant's premises has an annual value of RM5,400,000 (as per the local authority valuation) and therefore it would fall under the bracket where the annual value is between RM5,000,000 to RM7,000,000. The basic monthly charge under this bracket is RM9,200 per month; and

(b) the second is the additional charge which is based on the water consumption in premises where a charge of RM0.65 is charged for every cubic metre of water consumed above the first 100 cubic metre as provided in the proviso to reg 4(1)(b)(ii).

[11] PW2 states that in calculating the sewerage charges chargeable to the defendant, the plaintiff has used reg 4(1)(b)(ii). However, I find that the plaintiff has committed an error in making that calculation, in particular the second tier charge based on volume of water consumed on the premises. In assessing the evidence of the plaintiff's and defendant's witnesses, I find that there is only one bulk water meter for the whole building complex. That bulk meter supplies water to the entire building complex. From this bulk water meter water is supplied all owners and/or occupiers in the building complex. It is common ground that the defendant only occupies two floors among the many blocks and floors in the building complex. SP2 during cross-examination admitted that there is only one bulk water meter for Pandan Kapital. Therefore, I find that in computing the monthly charges, the plaintiff cannot take the bulk meter reading as the measure of monthly water consumption by the defendant. That bulk water consumption must be apportioned to all other users in the building complex to derive at the defendant's consumption. This, the plaintiff failed to do.

[12] The building complex has a joint management body ('JMB') formed to take charge of the common areas and facilities. The bulk water meter is under the purview of the JMB and the individual unit's consumption will be apportioned by the JMB and that is a more equitable and reasonable measure of consumption. It is definitely wrong to bill the defendant for the bulk water consumption of the whole building. In any event such a method of calculation runs foul of the provisions of reg 4(1)(b)(ii). Therefore, I find that the charges sought to be imposed on the defendant based on the bulk water meter reading and attributing the consumption wholly to the defendant is wrong in law.

[13] Another uncomplimentary feature of the plaintiff's case is that the plaintiff has never send the monthly sewerage charges bill to the defendant up till the trial. This was confirmed by PW2 during cross-examination by counsel for the defendant.

[14] As I have stated earlier, the obligation to pay monthly sewerage charges only arise after a bill has been rendered to the user as provided in reg 7. Here, there is clear admission on the part of the plaintiff that monthly sewerage charges bills were never sent to the defendant as can be seen in the following testimony of PW2:

> Q1: Question 8, you asked who is the defendant and you said the defendant is the customer of IWK. Any documents, Ms Devi?
>
> A1: No.
>
> Q2: To show, to support what you said that the defendant is a customer of IWK. Do you have any document to show that?
>
> A2: No.

Q3: No. So how do you know that the defendant is a customer of IWK? **A**

A3: Customer received the bill.

Q4: Received bill?

A4: Yes.

Q5: So from the bill you would know who are the customer, correct? **B**

A5: Yes.

Q6: Lets look at bundle A. I will start from page 11.

A6: Page 11. **C**

Q7: Is this the bill you referred to?

A7: Yes.

Q8: Can you tell the court what is the name on the left hand corner?

A8: Maxisegar Construction. **D**

Q9: My next question is why the name Maxisegar Construction Sdn Bhd and not the defendant, Inti Johan Sdn Bhd. Can you explain?

A9: At the point of billing we do not have the information of the customer. So our billing is addressed to developer. But for the same premise. **E**

Q10: Addressed to developer, so have you sent any bill to Inti Johan Sdn Bhd, the Defendant?

A10: We will address the bill to Komplek Beli Belah Pandan Kapital.

Q11: But I want you to answer whether did you issue any bill to Inti Johan Sdn Bhd? **F**

A11: Not under the name Inti Johan Sdn Bhd.

Q12: Until today is there any bill to Inti Johan Sdn Bhd?

A12: No. **G**

[15] In the face of this admission, this court cannot find that an obligation on the part of the defendant to pay has been established by the plaintiff. The plaintiff cannot wait for ten years and then lump together some figures in the form of a statement of accounts as in appendix 'A' to the statement of claim and **H** send them off to the defendant as the defendant's bill for the last ten years. That is unreasonable conduct. In as much as the statute and regulation impose a statutory duty on users to pay their monthly sewerage services bills, the statute and regulation also imposes reciprocal duties and obligations to ensure that **I** bills are calculated in accordance to the method and formula provided in the regulations and not arbitrarily. The Regulations also require that the plaintiff raise the bills in a timely manner. The sum of RM770,045.43 is no small amount and can have the dire effect on a commercial enterprise and in particular the defendant's cash flow.

[16] The defendant has also challenged the plaintiff to prove the requirement of regs 7 and 11 that the defendant has connected services before charges can be imposed. PW1 in his evidence stated that the is not sure if the outlet pipes from the premises are connected to the plaintiff's main sewerage outlet pipes. It is imperatives when such challenges are mounted, the plaintiff brings forth the evidence to discharge its evidential burden to establish the fact that the premises has connected services and that the defendant is a user in that respect. This, the plaintiff has failed to establish.

[17] The plaintiff will have to prove all the requirements of the Act and the regulations before an obligation can be imposed on any person to make these statutory payments. The plaintiff must ensure that bills are not raised in an arbitrary manner without cogent proof or support.

[18] In the premise of the foregoing and in considering the evidence in its totality and the submissions of counsel, I find that the plaintiff has failed to prove its case. Therefore, I dismissed the plaintiff's claim with cost of RM20,000.

Claim dismissed with costs of RM20,000.

Reported by Afiq Mohamad Noor